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NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RAMON CASTRO
and
MARIA DEL SOCORRO CASTRO,
Petitioners

VS.

SAUDI ARABIA,
Respondent

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI
To The United States Court Of Appeals
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Petitioners Ramon and Maria Castro request that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit affirming the District Court's dismissal of Petitioners' action.

QUESTIONS PRESENTED

1. How do United States citizens establish subject matter jurisdiction in a tort action against a foreign state brought under the Foreign Sovereign Immunities Act for the wrongful death of their sons caused by the negligence of an agent of the foreign state in the operation of an automobile in the United States?
2. If United States citizens file a complaint against a foreign state alleging causes of action within the non-commercial tort exceptions to foreign sovereign immunity under 28 U.S.C. §1605(a)(5), and obtain

service of process on the foreign state pursuant to 28 U.S.C. §1608(a) (4), does the district court have subject-matter jurisdiction under 28 U.S.C. §1330(a)?

3. Does a foreign state waive its affirmative defense of sovereign immunity by failing to appear or answer and allowing default judgment to be taken against it in a tort action under the Foreign Sovereign Immunities Act?

4. Is it accepted procedure for a district court to conduct a default judgment hearing in a tort action against a foreign state, enter judgment for the plaintiffs supported by findings of fact and conclusions of law establishing the foreign state's liability, then, upon the post-judgment filing of an answer and motion to vacate the judgment by the foreign state, alter its original fact findings and dismiss for lack of subject-matter jurisdiction?

5. If the evidence offered by a foreign state at a hearing on its motions to set aside a default judgment shows that it might have meritorious defenses to the plaintiffs' tort causes of action, is it proper for the district court to dismiss the action for lack of jurisdiction rather than granting a new trial to develop all the evidence?

OPINIONS BELOW

The orders and opinions of the District Court for the Western District of Texas are unreported. They are included in the Appendix hereto. The Court of Appeals for the Fifth Circuit summarily affirmed the judgment of dismissal without an opinion.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on March 26, 1981. An order denying a timely motion for rehearing was entered on April 24, 1981. The statutory provision conferring jurisdiction on this Court is 28 U.S.C. §1254(1).

STATUTES INVOLVED

28 U.S.C. §1330:

(a) The district courts shall have jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

28 U.S.C. §1602:

The Congress finds that the determination by the United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and the litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. §1604:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. §1605:

(a) A foreign state shall not be immune from juris-

diction of courts of the United States or of the States in any case—

* * *

(5) . . . in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; . . .

28 U.S.C. §1606:

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; . . .

28 U.S.C. §1608:

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

* * *

(3) . . . by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary

of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

* * *

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a) (4) as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

STATEMENT OF THE CASE

This suit was brought by Petitioners Ramon and Maria Castro, citizens of the United States, against the Kingdom of Saudi Arabia, a sovereign nation, under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §1602–1611. Jurisdiction is founded on 28 U.S.C. §1330. The Castros' Original Complaint was filed February 19, 1979, alleging Saudi Arabia's liability under Texas tort law for the actions of a Royal Saudi Air Force Officer in causing the deaths of the Castros' two teenage sons in an automobile-pedestrian collision near Del Rio, Texas, on September 17, 1978.

In 1976, the governments of Saudi Arabia and the United States entered into a contract for the training of forty Royal Saudi Air Force cadets at Laughlin Air Force Base, adjacent to the City of Del Rio, Texas. Under the terms of the contract, Saudi Arabia agreed to accept liability and to indemnify the United States for any injuries to third parties arising out of the activities undertaken in connection with the contract. The contract further expressly stated that:

> Purchasing country [Saudi Arabia] will be responsible for all student transportation, pay, and allowances.

One of the Saudi Air Force trainees was Lt. Ali Atallah Al-Qassimie. He came to the United States only because Saudi Arabia sent him here for training pursuant to the contract. However, Saudi Arabia made no arrangements for his transportation while in the United States. Al-Qassimie had never obtained a driver's license in Saudi Arabia, although a license was required there. He took no driver's training in the United States, but obtained a Texas driver's license. He then purchased a 1971 Cadillac which he and other Saudi students used for their transportation to and

from Laughlin Air Force Base. As of September 16, 1978, Al-Qassimie had been driving the Cadillac less than one month.

On that date, Al-Qassimie left the Air Force Base at 11:00 p.m. in his Cadillac and went to a bar in Del Rio where he and other Saudi trainees often went to drink and dance. While there, he consumed some alcohol. Around 3:00 a.m., he started to head back to the Base, and was traveling east on Highway 90 when he swerved to the right and struck two pedestrians, Joe and Gregorio Castro, ages 16 and 17. The Castro boys had spent the evening in the neighboring town of Acuna, Mexico, celebrating Mexican Independence Day, and were returning to their home in Del Rio, walking on the shoulder of the roadway. The impact of the collision killed the two boys instantly. Al-Qassimie, however, was not seriously injured. A patrolman with the Del Rio Police Department testified at the default judgment hearing that Al-Qassimie appeared intoxicated and smelled of alcohol after the accident.

Petitioners presented extensive expert testimony at the default judgment hearing to show that Saudi Arabia maintains a much more restrictive culture and society than the United States. Saudi Arabian law is based on literal application of Islamic tenets. Consumption of alcohol is strictly forbidden. In addition, the Saudi language and culture reflect a different concept of time than ours which adversely affects the Saudis' ability to react in stressful situations; this would be aggravated by the unfamiliar influence of alcohol. Petitioners' human factors expert testified that Saudi Arabia could have and should have taken precautions to prepare the Saudi students for such foreseeable cross-cultural differences, and that the failure to do so, or to control the students' consumption of alcohol while in this country, con-

stituted a departure from ordinary care and contributed to the causation of the accident.

The deaths of the Castro boys caused severe injury to Petitioners. Ramon Castro was previously disabled and unable to support his family; neither he nor Maria Castro speaks English or drives a car. Joe and Gregorio, the two oldest of seven children, provided much of the family's financial and emotional support and served as interpreters for their parents.

After this suit was filed, service of process on Saudi Arabia was completed on May 26, 1979, in conformity with the service provisions of the FSIA, 28 U.S.C. §1608(a)(4). However, Saudi Arabia failed to appear and answer; instead, Saudi Arabia sent a cable to Washington, D.C., stating that the Saudis had returned the documents served upon them and that they wanted the United States Embassy to defend for them on the grounds of immunity. The United States Government notified the Saudi Arabian Government that it could not intervene in the lawsuit under the FSIA.

On July 26, 1979, Petitioners moved for a hearing at which to present evidence in support of a default judgment against Saudi Arabia. On August 16–17, 1979, the District Court held an evidentiary hearing. After taking the case under advisement for three additional months, on November 8, 1979, the Court entered findings of fact and conclusions of law and signed an order granting judgment by default to the Plaintiffs based on Saudi Arabia's liability under the FSIA and Texas substantive tort law. The court awarded Petitioners $985,242. in damages. (Appendix A)

By September, 1979, the complaint and summons had been brought to the attention of Mr. Frederick Dutton of Washington, D.C., Saudi Arabia's principal legal counsel in the United States. Mr. Dutton testified at the post-judg-

ment hearing that he did not contact local counsel about representing Saudi Arabia or filing an answer in the action until the first week of November, 1979. On November 9, the day after the judgment was signed, Saudi Arabia finally filed an answer to the complaint, and on November 16, 1979, Saudi Arabia filed a motion to vacate the default judgment and a motion for new trial. Those motions were set for hearing on April 22, 1980, at which time Saudi Arabia presented evidence to support its contention that it was not responsible for Al-Qassimie's actions under Texas tort law, and also to support its Rule 60(b) motion for relief from judgment on the ground of mistake, inadvertence or excusable neglect in failing to file a timely answer.

On June 12, 1980, the District Court issued an opinion and order granting Saudi Arabia's motion to vacate the default judgment for lack of jurisdiction and dismissing the suit, and also conditionally granting Saudi Arabia's motion for new trial based on a finding that the default was not willful. (Appendix B) The Court of Appeals summarily affirmed the order of dismissal for lack of jurisdiction.

ARGUMENT FOR ALLOWANCE OF THE WRIT

I.

IMPORTANCE OF THE QUESTIONS PRESENTED

This is a case of first impression in the United States concerning the method of establishing jurisdiction over a foreign state under the "non-commercial tort exceptions" to foreign sovereign immunity set forth in 28 U.S.C. §1605 (a)(5), *supra*. Only since the enactment of the Foreign Sovereign Immunities Act in 1976 has it been possible for a private United States citizen to bring a common-law tort action directly against a foreign state under specific statutory guidelines and without the intervention of the U.S.

State Department.[1] This is believed to be the first litigated action under the FSIA based on an automobile accident involving the alleged negligence of a foreign government. Nonetheless, with rapidly increasing international business and travel and inter-governmental contacts, the fact situation presented in this case (or similar fact situations) can be expected to recur with increasing frequency. In order that the lower courts, as well as practicing attorneys and the public at large, may understand what rights an injured U.S. citizen may have vis-a-vis a foreign state, it is crucial that the Supreme Court address the jurisdictional questions raised by the allegations, evidence, and proceedings in this case.

Subject matter jurisdiction under the FSIA is controlled by 28 U.S.C. §1330(a), which grants jurisdiction "as to any claim . . . with respect to which the foreign state is not entitled to immunity . . . under sections 1605–1607 of this title." Section 1605(a)(5) in turn provides that the foreign state shall not be immune in any case in which the plaintiffs seek damages for injury or death caused by the tortious act or omission of the foreign state *or* of any employee of the foreign state acting in the course and scope of employment.[2]

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1. As stated in 28 U.S.C. §1602, *supra*, the FSIA is a codification of the restrictive theory of sovereign immunity first enunciated in the famous "Tate Letter" of 1952. 26 DEP'T STATE BULL. 984–85 (1952). *See Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682,698 (1976); *Victory Transport, Inc. v. Comisaria General de Abstecimientos y Transportes*, 336 F. 2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965); Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice*, 33 SW. L.J. 1009, 1011–14 (No. 1980).

2. Petitioners also attempted to demonstrate subject-matter jurisdiction by virtue of the exceptions to immunity in actions based on commercial activities of the foreign state under 28 U.S.C. §1605(a)

In their Original Complaint, the Castros alleged that Saudi Arabia *itself* was guilty of tortious acts and omissions, apart from its alleged liability in respondeat superior. Saudi Arabia was alleged to have expressly assumed responsibility "for all student transportation," but then to have negligently abdicated its duty in this regard by (1) permitting Al-Qassimie to transport himself in a Cadillac without adequate driver's training or cross-cultural instruction, and (2) failing to either control his consumption of alcohol or to supervise the times, places, and conditions in which he drove his Cadillac.[3] Alternatively, the Castros alleged that Al-Qassimie was acting in the course and scope of his office or employment at the time of the accident.

These allegations of negligence causes of action against Saudi Arabia clearly were sufficient to bring the action within the terms of §1330(a) and §1605(a)(5), and, upon service of process under §1608(a)(4), the District Court therefore had subject-matter jurisdiction. The FSIA legislative history states that sovereign immunity is an *affirmative defense* which the foreign state has the burden of pleading and proving. H.R. 94–1487 at 17, 1976 U.S. Code Cong. and Admin. News 6604, 6616. *Cf. In Re Muir*, 254 U.S. 522, 532–4 (1921). The Congressional record further makes it clear that traffic accidents create the very sort of tort claims for which §1605(a)(5) is designed. H.R. 94–

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(2). However, Petitioners now concede that that section provides no basis for jurisdiction under the factual circumstances of this case.

3. These claims fit precisely within the ambit of §308 of the Restatement (2d) of Torts:

"It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others."

See also §390 of the Restatement.

1487 at 20–21, 1976 U.S. Code. Cong. and Admin. News at 6619–20. *See also Letelier v. Republic of Chile*, 488 F. Supp. 665, 671–2 (D. D.C. 1980). Since Plaintiffs' alleged causes of action came within the statutory grant of jurisdiction, and since Saudi Arabia defaulted after being properly served, it was plainly error to dismiss the action *for lack of jurisdiction.*

This reasoning is consistent with the court's analysis in *Letelier v. Republic of Chile*, 488 F.Supp. 665 (D. D.C. 1980), an action under §1605(a)(5) for assault and battery and related torts arising out of an assassination attempt, where the foreign state defaulted. The district court held there was *jurisdiction* by virtue of the allegations in the complaint; the default judgment hearing to determine liability *on the merits* was a separate matter. 488 F.Supp. at 674. *See also Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1380 (5th Cir. 1980).

Thus, even if the evidence offered by the Castros at the default judgment hearing to substantiate their tort claims against Saudi Arabia had not satisfied the District Court, *see* 28 U.S.C. §1608(e), *supra*, it could not somehow have deprived that court of subject-matter jurisdiction.

It is incomprehensible that the Court of Appeals did not deem this crucial jurisdictional question of sufficient significance to warrant an opinion justifying its affirmance of the District Court's dismissal for lack of jurisdiction. This Court should act to resolve this important question concerning the procedure for establishing subject-matter jurisdiction in a tort action against a foreign state.

II.

DEPARTURE FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS

By its summary affirmance of the District Court's dismissal of the Castros' claims, the Court of Appeals for the Fifth Circuit has sanctioned a highly irregular procedure for reviewing motions for relief from a default judgment.

Of peculiar note and critical importance in this case is that the District Court did not dismiss the action prior to the default judgment hearing; to the contrary, the court implicitly held that it had jurisdiction when it permitted Petitioners to present evidence on their negligence claims, and the court then entered findings of fact and conclusions of law *upholding* Petitioners' claims under Texas substantive law, including the causes of action based on Saudi Arabia's own tortious acts and omissions.

Only *after* judgment was entered and a second hearing was later held on Saudia Arabia's post-judgment motions did the District Court dismiss the action for lack of jurisdiction. The court's disposition of the case obviously was based on the additional, conflicting evidence adduced by Saudi Arabia at the post-judgment hearing; but the *only* relief to which Saudi Arabia could possibly be entitled at that stage would be a new trial based on excusable neglect and evidence of meritorious defenses.

The evidence offered by Saudi Arabia in seeking to have the judgment set aside could not legitimately be taken as conclusively establishing that Petitioners could under no circumstances prevail at a full trial on the merits of their claims; indeed, the District Court had previously held that the Castros had produced satisfactory evidence to establish their right to relief. Once the default judgment is entered,

the plaintiffs have no further burden of proof. *Thomson v. Wooster*, 114 U.S. 104 (1885); *Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 63–4 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973).

If the District Court was of the view that Saudi Arabia's post-judgment evidence raised questions about the Castros' ability to prove their negligence claims in an adversary proceeding, then it should have granted relief under Rule 60(b)(1) or (6) (assuming the default was not willful) and allowed for the full development of the evidence through the discovery process and a new trial.

Instead, when the District Court entered its post-judgment order dismissing the lawsuit, not only was the Petitioners' default judgment evidence suddenly discounted, Petitioners were deprived of any opportunity to proceed further at all. But stranger still, the District Court never disavowed or withdrew its previous findings sustaining the Castros' claims; it simply drew new conclusions based on the limited post-judgment presentation and then dismissed for lack of jurisdiction!

Surely this "now you see it, now you don't" approach to subject-matter jurisdiction in an action against a foreign state cannot be countenanced. The Petitioners went to great lengths to comply in all respects and in every detail with the procedures established by Congress in the Foreign Sovereign Immunities Act. Those procedures have been turned on their head by the inexplicable standards which the District Court used in ruling on Saudi Arabia's post-judgment motions. The Court of Appeals affirmed those rulings without reasoning or explanation. This Court should grant Petitioners' Writ of Certiorari to consider fully the jurisdictional issues raised herein so as to provide reasoned guidance in this and future tort actions under 28 U.S.C.

§1330(a) and §1605(a)(5) of the Foreign Sovereign Immunities Act.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioners pray that this Honorable Court grant their Petition for Writ of Certiorari and that, upon submission of briefs and argument, this Court reverse the judgment of the Court of Appeals for the Fifth Circuit dismissing Petitioners' claims for lack of jurisdiction and remand the cause to the Court of Appeals to consider Petitioners' contention that the District Court was clearly erroneous in finding Saudi Arabia's failure to answer was not willful.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Petition for Writ of Certiorari has been mailed to the attorney of record for the Defendant in this cause, Mr. Haygood Gulley, at his proper post office address of Doran, Gulley & Etzel, 307 East 10th Street, P. O. Box 1485, Del Rio, Texas, 78840, on this the 15th day of July, 1981.

Respectfully submitted,

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APPENDIX

Order Granting Plaintiffs' Motion for Default Judgment as to Ramon Castro Robles and Maria Del Socorro Castro, and Denying Plaintiffs' Motion for Default Judgment as to all Other Plaintiffs A-1

Order Declaring Default Judgment Void for Lack of Jurisdiction and Dismissing Action B-1

Judgment of the United States Court of Appeals for the Fifth Circuit C-1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

RAMON CASTRO, MARIA DEL SOCORRO CASTRO, MARTHA ELENA CASTRO, BERTHA ALICIA CASTRO, SOCORRO GUADALUPE CASTRO, JESUS RAMON CASTRO, AND ROSE ISELA CASTRO, INDIVIDUALLY AND AS THE SURVIVORS OF JOE RAYMOND CASTRO AND GREGORIO CASTRO	§	DR-79-CA-05
VS.	§	
SAUDI ARABIA	§	

ORDER GRANTING PLAINTIFFS' MOTION FOR DEFAULT JUDGMENT AS TO RAMON CASTRO ROBLES AND MARIA DEL SOCORRO CASTRO, AND DENYING PLAINTIFFS' MOTION FOR DEFAULT JUDGMENT AS TO ALL OTHER PLAINTIFFS

On August 16–17, 1979, this court held an evidentiary hearing on the Plaintiffs' Motion for Default Judgment. At the close of the evidence, the court directed Plaintiffs to submit proposed findings of fact and conclusions of law and a proposed judgment. This having been done, the court finds that Plaintiffs Ramon Castro Robles and Maria Del Socorro Castro, parents of the deceased, have established their right to relief by evidence satisfactory to the court and a default judgment shall be entered in their favor. The other Plaintiffs are not entitled to judgment.

The court makes the following findings of fact and conclusions of law. Any conclusion of law that is deemed to be a finding of fact is adopted as such. Conversely, any finding of fact that is deemed to be a conclusion of law is adopted as such.

FINDINGS OF FACT

1. At approximately 3:15 A.M. on September 17, 1978, Ali Atallah Al-Qassimie drove a 1971 Cadillac into Joe and Gregorio Castro, causing their deaths.

2. At the time of the collision, Joe and Gregorio Castro were pedestrians walking alongside of the road, but not on the road.

3. The car driven by Al-Qassimie left the road about 162 feet before it struck Joe and Gregorio Castro. The car traveled 49 feet more, hit a culvert, and continued another 75 feet before it came to a final rest.

4. Joe and Gregorio Castro, aged 17 and 18, were killed instantly. The car was a total loss.

5. Al-Qassimie was driving the car at an excessive rate of speed.

6. Al-Qassimie failed to keep control of the car he was driving and failed to keep it on the road.

7. At the time of the collision, Al-Qassimie was under the influence of alcohol.

8. Al-Qassimie was a student pilot, attached to Laughlin Air Force Base. He was sent to the United States by contractual agreement to learn to speak English and fly American jet fighters.

9. Al-Qassimie had a Texas driver's license.

10. The course of conduct between Saudi Arabia and the

United States, as evidenced by the contract, was commercial in nature.

11. By the terms of its contract with the United States, Saudi Arabia assumed responsibility for all student transportation.

12. To fulfill this responsibility, Saudi Arabia furnished Al-Qassimie with money to purchase a private automobile. Saudi Arabia furnished no other transportation arrangements.

13. The Saudi Arabian culture is markedly different from American culture. The Arabians have a different concept of time than we do in our culture. Also, alcohol consumption is severely restricted in Saudi Arabia.

14. The above cultural differences increased the driver's reaction time and thus contributed to the fatal accident.

15. The government of Saudi Arabia failed to adequately train, indoctrinate, or otherwise prepare Al-Qassimie for life in the United States and for driving in the United States.

16. The government of Saudi Arabia failed to control Al-Qassimie's consumption of alcoholic beverages.

17. Service was first made upon the Defendant, Saudi Arabia, when the clerk of court sent a copy of the summons and complaint and a notice of suit, together with a translation of each into Arabic, by direct mail requiring a signed receipt to the Ministry of Foreign Affairs of Saudi Arabia. The return receipt was signed by the proper authority. However, no response was forthcoming from Saudi Arabia within 60 days of the date the return receipt was signed; indeed, no response has been received to this date.

18. Service was again made, this time through diplomatic channels. Two copies of the summons and complaint, notice

of suit, and affidavit of Dr. Nigil Burgheim, together with an Arabic translation of each, was sent by registered mail on April 4, 1979, by the clerk of court to Mr. Allan Gise, Director of Special Consular Services in Washington, D.C. The return receipt is signed by Brian Thomas, who is Chief, Near East and South Asia Division, Office of Citizen's Consular Services. Copies of the summons, complaint, notice of suit, and translations were delivered with diplomatic note, to the Royal Ministry of Foreign Affairs of the Kingdom of Saudi Arabia on May 26, 1979.

19. No response was forthcoming from Saudi Arabia within 60 days of May 26, 1979, the date of transmittal indicated in the diplomatic note, or, in fact, to this date.

20. Attorneys and representatives of the Kingdom of Saudi Arabia were personally told at a state court related deposition of Al-Qassimie that a lawsuit would probably be filed against Saudi Arabia.

21. Brian Thomas received a cable from the United States Embassy in Jidda, stating that the Arabs had returned the documents served upon them, and that they wanted the United States Embassy to defend for them on the grounds of immunity. The United States Embassy notified the Saudi Arabian government that it would not defend the lawsuit for the Kingdom of Saudi Arabia.

22. The government of Saudi Arabia was informed in writing, as well as personally by Brian Thomas, that they should appear and file a formal answer or that a default judgment would be taken.

23. The failure of Saudi Arabia to answer or otherwise appear in this action was, by all indications, knowing and wilful.

24. Joe and Gregorio Castro were the two oldest children

in the family. Their father has been disabled since 1972; the two boys were heavily depended upon by their parents.

25. Based on the average earning capacity of Texas high school graduates, adjusted over the life expectancy of the parent with the longer life expectancy, reduced for personal consumption, increased at a long-term wage increase rate of 5% a year, and discounted to present value at a 8½% rate, the earning capacity of Joe Castro was about $419,000 and of Gregorio Castro, about $376,000. The total earning capacity of the two boys was $795,846.

26. The boys averaged 20–30 hours of household services and chores in the parents' home each week, which, after discounting, is valued at about $74,000 each, or a total of $147,816.

27. The funeral and burial expenses amounted to $1,580.

28. Plaintiffs sustained actual damages for the loss of society, support, care, counsel, advice, and comfort given them by Joe and Gregorio Castro of $20,000.00 each, or $40,000.00.

CONCLUSIONS OF LAW

1. Jurisdiction is proper in this court.

2. Plaintiffs strictly complied with the provisions of 28 U.S.C. §1608(a)(3) and (4) relating to service of process on the government of Saudi Arabia. Those were the proper service provisions in this case.

3. The court was required to conduct a hearing on the evidence, and have the claim or right to relief established by evidence satisfactory to the court. 28 U.S.C. §1608(e).

4. The hearing on the evidence resembles the hearing required by Rule 55(e), F.R.Civ.P., before a default judg-

ment can be entered against the United States. 1976 U.S. CODE CONG. & AD. NEWS 6625.

5. In the contract with the United States, the government of Saudi Arabia expressly and impliedly waived the defense of sovereign immunity in accordance with 28 U.S.C. §1605(a)(1).

6. The contractual arrangement between the governments of Saudi Arabia and the United States is a "commercial activity" within the meaning of 28 U.S.C. §§1603(d) and 1605(a)(2). *National American Corp.* v. *Federal Republic of Nigeria*, 448 F.Supp. 622, 642 (S.D.N.Y. 1978).

7. Ali Atallah Al-Qassimie was negligent:
   a. in driving while intoxicated;
   b. in failing to maintain a proper speed;
   c. in failing to keep a proper lookout;
   d. in leaving the roadway and striking Joe and Gregorio Castro.

8. The deaths of Joe and Gregorio Castro were proximately caused by the negligence of Al-Qassimie. *Missouri Pac. R. Co. v. American Statesman*, 552 S.W.2d 99, 103–104 (Tex. 1977).

9. Al-Qassimie was an agent of the government of Saudi Arabia, sent to the United States to learn to speak English and fly American jet fighters. *Valley View Cattle Co.* v. *Iowa Beef Processors*, 548 F.2d 1219, 1221 (5th Cir.), *cert. denied*, 434 U.S. 855 (1977).

10. The particular circumstances involved indicate that at all relevant times while in the United States, Al-Qassimie was within the scope of his office or employment. *See, Kulms* v. *Jenkins*, 557 S.W.2d 149, 152 (Tex.Civ.App.—Amarillo 1977, writ ref'd. n.r.e.); *G&H Equipment Co., Inc.* v. *Alexander*, 533 S.W.2d 872 (Tex.Civ.App.—Fort Worth 1976,

no writ history); *Best Steel Bldgs., Inc.* v. *Hardin*, 553 S.W. 2d 122, 128 (Tex.Civ.App.—Tyler 1977, writ ref'd. n.r.e.).

11. The government of Saudi Arabia was negligent in doing those acts set forth in findings of fact paragraph numbers 12, 15, and 16.

12. Saudi Arabia negligently entrusted the use of a private automobile to Al-Qassimie. *Hines* v. *Nelson*, 547 S.W.2d 378, 385 (Tex.Civ.App.—Tyler 1977, no writ).

13. The negligence of Saudi Arabia was a proximate cause of the deaths of Joe and Gregorio Castro. *Missouri Pac. R. Co.* v. *American Statesman*, 552 S.W.2d at 103–104.

14. Texas law controls on all substantive issues in the instant case. *Cf. Alexander* v. *United States*, No. 77–1612 (5th Cir. October 31, 1979), slip op. at 635. (A tort case under the Federal Tort Claims Act.)

15. The Texas wrongful death statutes create a cause of action, not existing at common law, for the death of a person. Tex. Rev. Civ. Stat. Ann. art. 4671 (Supp. 1979); *Mitchell* v. *Akers*, 401 S.W. 2d 907, 909 (Tex.Civ.App.—Dallas 1966, writ ref'd n.r.e.).

16. The parents of the deceased can bring an action for damages arising from death. The brothers and sisters, however, do not have a right to bring an action. Tex. Rev. Civ. Stat. Ann. art. 4675 (1940); *Boudreaux* v. *Texas N.O.R. Co.*, 78 S.W.2d 641, 642 (Tex.Civ.App.—Beaumont 1935, writ ref'd).

17. The parents of Joe and Gregorio Castro are entitled to recover the amount that their two children would have contributed to their support, had the children lived. *Missouri-Kansas-Texas Railroad Company* v. *Pierce*, 519 S.W.2d 157 (Tex.Civ.App.—Austin 1975, writ ref'd n.r.e.).

18. Also, the parents may recover the money value of labor, services, kindness, advice, counsel, and attention that the children would have contributed. *Borak* v. *Bridge*, 524 S.W. 2d 773, 776 (Tex.Civ.App.—Corpus Christi 1975, writ ref'd n.r.e.).

19. Saudi Arabia is not liable for punitive damages. 28 U.S.C. §1606.

20. Ramon Castro Robles and Maria Del Socorro Castro, parents of the deceased boys, are entitled to a default judgment against Saudi Arabia in the amount of Nine Hundred Eighty-Five Thousand Two Hundred Forty-Two Dollars ($985,242.00).

21. Judgment shall be entered and the Clerk shall send a copy of this order and the default judgment entered thereon, to the Defendant, Saudi Arabia, in the manner prescribed for service in 28 U.S.C. §1608. 28 U.S.C. §1608(e).

SO ORDERED this 8th day of November, 1979.

/s/ D. W. SUTTLE
United States District Judge

B-1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

RAMON CASTRO, MARIA DEL SOCORRO CASTRO, MARTHA ELENA CASTRO, BERTHA ALICIA CASTRO, SOCORRO GUADALUPE CASTRO, JESUS RAMON CASTRO, AND ROSE ISELA CASTRO, INDIVIDUALLY AND AS THE SURVIVORS OF JOE RAYMOND CASTRO AND GREGORIO CASTRO	§	DR-79-CA-05
VS.	§	
SAUDI ARABIA	§	

ORDER DECLARING DEFAULT JUDGMENT
VOID FOR LACK OF JURISDICTION
AND DISMISSING ACTION

Only the plaintiffs were represented at the evidentiary hearing on the plaintiffs' motion for default judgment. Because the plaintiffs' evidence indicated that Saudi Arabia's failure to answer was wilful, and because the court hesitated to vigorously engage in the role of adversary on behalf of a wilfully defaulting defendant, the court was satisfied with a minimum of evidence in support of the plaintiffs' claims. 28 U.S.C. §1608(e). Even so, the court entered the default judgment with some measure of misgiving. Transcript I at 89–92, 109[1]. The default judgment was signed on November 8, 1979, in San Antonio, but not filed until the clerk

1. "Transcript I" is the transcript of the first hearing held on August 22–23, 1979. "Transcript II" will refer to the transcript of the second hearing, held on April 22–23, 1980.

in Del Rio received it on November 10, 1979. Meanwhile, on November 9, the defendant filed its answer, specifically pleading the defense of sovereign immunity.

On April 22–23, 1980, this court held a second evidentiary hearing, this time with both plaintiffs and the defendant present. The court received evidence and entertained oral argument on the defendant's motion to have the default judgment declared void for lack of jurisdiction and on the defendant's motion for new trial. After making a full inquiry into the jurisdictional issue, and after carefully considering the oral argument offered at the adversary proceeding and the written briefs and memorandum submitted by both sides, the court concludes that it does not have subject matter or personal jurisdiction of the action. Consequently, the default judgment must be set aside as void and the action dismissed. In the alternative, the court finds from the record and from the evidence presented at the proceeding that the defendant's motion for new trial should be granted.

Even though this court has previously entered a default judgment against Saudi Arabia, it now reexamines the issue of subject matter jurisdiction, for without subject matter jurisdiction the default judgment is a nullity. *Nishimatsu Construction Co.* v. *Houston Nat. Bank*, 515 F.2d 1200, 1205 (5th Cir. 1975); Wright & Miller, FEDERAL PRACTICE & PROCEDURE §2695 p. 326.

The statute conferring jurisdiction on this court makes the absence of sovereign immunity a prerequisite to both subject matter and personal jurisdiction. 28 U.S.C. 1330. Consequently, the court made a thorough inquiry at the evidentiary hearing into the question of jurisdiction, fully developing all facts pertaining to sovereign immunity. See Transcript II at 151. *Upton* v. *Empire of Iran*, 459 F.Supp.

264, 265 (D.D.C. 1978); *Bickham v. Miller,* 584 F.2d 736, 737 (5th Cir. 1978).

The Foreign Sovereign Immunities Act, [FSIA], provides a comprehensive procedure for the maintenance of suits *in personam* against foreign states and their agencies. *National American Corporation* v. *Federal Republic of Nigeria,* 448 F. Supp 622, 638 (S.D.N.Y. 1978).[2] The FSIA states generally that a foreign state shall be immune from the jurisdiction of the courts of the United States, except as specifically provided in §§1605–1607. The plaintiffs attempt to fit the facts of this case within the following exceptions:

1. *Waiver §1605(a)(1)*

The court finds that Saudi Arabia did not waive the sovereign immunity defense by failing to timely answer. *See, International Association of Machinists and Aerospace Workers* v. *Organization of Petroleum Exporting Countries,* 477 F.Supp. 553, 575 (C.D. Cal. 1979) [the OPEC case], wherein the question of waiver was specifically raised to the court—see paragraph 14 on page 579—yet the court found no waiver of sovereign immunity from the defendant's failure to answer). *Compare Flota Maritima Browning de Cuba* v. *Motor Vessel Cuidad,* 335 F.2d 619 (4th Cir. 1964) (wherein the Republic of Cuba waived the defense

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2. This court rejects Saudi Arabia's argument that because §1604 of the FSIA states that the Act is "subject to international agreements" the Act should not apply to this case at all. The court agrees with the plaintiffs that §1604 was designed to resolve any doubt that may be created by an express conflict between the terms of a preexisting treaty or like international agreement and the provisions of the Foreign Sovereign Immunities Act. 1976 U.S. CODE CONG. & ADMIN. NEWS p. 6616; *Behring International, Inc.* v. *Imperial Iranian Air Force,* 475 F.Supp. 383, 393 (D. N.J. 1979): No such conflict is apparent here.

of sovereign immunity by filing a general appearance and waiting three years to raise the defense of sovereign immunity).

A foreign state does not waive its sovereign immunity by merely entering into a contract with another nation. There must be an intentional and knowing relinquishment of the legal right. *Mitchell v. Aetna Casualty & Surety Co.*, 579 F.2d 342, 347 (5th Cir. 1978). Saudi Arabia's agreement to indemnify and hold harmless the United States government from loss and liability that the United States might incur in connection with the agreement, and Saudi Arabia's agreement to be responsible for all student transportation, simply do not approximate the type of implicit waiver Congress contemplated in §1605(a)(1). The legislative history cites actions more emphatically implying a waiver of immunity, such as, an agreement to arbitrate in another country, an agreement that the law of another country will govern the contract, or the filing of a responsive pleading in an action without raising the defense of sovereign immunity. 1976 U.S. CODE CONG. & ADMIN. NEWS at 6617. *See*, e.g., *Ipitrade International* v. *Federal Republic of Nigeria*, 465 F.Supp. 824, 826 (D. D.C. 1978); *Flota Maritima Browning de Cuba* v. *Motor Vessel Cuidad*, 335 F.2d 619, 625 (4th Cir. 1964).

2. *Commercial Activity, §1605(a)(2)*

The plaintiffs also claim an exception to immunity under the section providing that a foreign state is not immune in any case "in which the action is based on a commercial activity carried on in the United States by the foreign state." 28 U.S.C. §1605(a)(2). The statute explicitly directs that the character of an activity shall be determined by reference to the *nature* of the course of conduct or particular act, and not by reference to its purpose. 28 U.S.C. §1603(d). The legislative history is helpful, but

not determinative. The fact that "services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical." 1976 U.S. CODE CONG. & ADMIN. NEWS. at 6615. The transaction at issue here could be broadly defined as the "sale of services" and so be deemed "commercial." But the activity could also be narrowly viewed as a non-profit agreement between two governments for the training of military personnel. So viewed, the transaction would be public or governmental, and protected by sovereign immunity.

At the adversary proceeding, counsel for Saudi Arabia directed the court's attention to the recent OPEC case, *International Association of Machinists and Aerospace Workers* v. *OPEC*, 477 F.Supp. 553 (C.D. Cal. 1979). In this case, as in the *OPEC* case, "commercial activity" is best defined narrowly; Saudi Arabia has the sole power to control its armed forces, and proper training of those forces is an essential ingredient of that control. In addition the fact that the contract is expressly "non-profit" convinces the court that the arrangement between the two sovereigns is not commercial in nature. *Compare United Euram Corporation* v. *Union of Soviet Socialist Republics,* 461 F.Supp. 609 (S.D. N.Y. 1978), (the court found a "sale of services" commercial in nature where the plaintiff was to pay a fee to the Soviet agency *in addition* to the salaries and expenses of the tour.)

3. *Scope of Employment*

Section 1605(a)(5) abrogates a foreign state's immunity when money damages are sought for death occurring in the United States and caused by the tortious act or omission of the foreign state or of any of its employees acting in the scope of employment. At the adversary hearing, Saudi Arabia proved that there were no flight training activities

scheduled either on the 16th or the 17th of September, Transcript II at 30, and that Al-Qassimie was in civilian clothes at the time of the accident. Transcript II at 28. Applying state law principles of respondeat superior, *Williams* v. *United States*, 350 U.S. 857 (1955), the court fails to see how the soldier can be said to have been in the course of his employment even while off duty and pursuing an entirely personal matter. *Standard Oil Company* v. *United States*, 307 F.2d 120, 128 (5th Cir. 1962); *Gifford-Hill & Company* v. *Moore*, 479 S.W.2d 711, 716 (Tex.Civ.App. Tyler 1972, no writ).

In addition, Saudi Arabia put on evidence that Al Qassimie was subject to the United States Air Force regulations while at Laughlin Air Force Base. Thus, it was the United States government who apparently had the right to control the soldier's behavior in off-duty hours, not the Saudi Arabian government. *See, Greyhound Van Lines, Inc.* v. *Bellamy*, 502 S.W.2d 586, 588 (Tex.Civ.App.— Waco 1973, no writ).

The plaintiffs also assert that section 1605(a)(5) applies because the foreign state itself tortiously failed to properly prepare Al-Qassimie for driving in the United States and negligently entrusted the automobile to the soldier. Saudi Arabia cannot be liable under a negligent entrustment theory because it did not own the automobile the soldier was driving at the time of the accident. Transcript II at 108. *See, Hines* v. *Nelson*, 547 S.W.2d 378, 385 (Tex.Civ.App.— Tyler 1977, no writ). Likewise, the fact that Al-Qassimie was issued a valid driver's license by the State of Texas negates any claim that Saudi Arabia tortiously failed to prepare him for life in the United States. Saudi Arabia is entitled to rely upon American testing procedures, based upon American standards, for the evaluation of Al-

Qassimie's competence to operate automobiles on American roads.

The defendant has demonstrated that none of the exceptions in FSIA operate to deprive Saudi Arabia of its immunity from this court's jurisdiction. Consequently, the default judgment must be declared void, and the action dismissed for lack of subject matter and personal jurisdiction. 28 U.S.C. 1330.

In the event that this court has erred in its ruling on the jurisdictional issue, the court rules that it would grant the defendant a new trial under Rules 55(c) and 60(b), F.R.C.P. Saudi Arabia produced ample evidence to show that its failure to answer was not, in fact, wilful, but rather the product of confusion or ignorance. *United States Corporation* v. *Freeman*, 605 F.2d 854, 857 (5th Cir. 1979). Saudi Arabia's unique cultural differences and difficulties distinguish Saudi Arabia from domestic corporations who fail to answer due to an absence of minimal internal procedural safeguards. *See, Baez* v. *S. S. Kresge Co.*, 518 F.2d 349 (5th Cir. 1975), *cert. denied*, 425 U.S. 904 (1976), and *Davis* v. *Safeway Stores, Inc.*, 532 F.2d 489, 490 (5th Cir. 1976).

As discussed above, Saudi Arabia has shown that it has meritorious defenses to the plaintiffs' claims, and factual bases therefor. *See, Moldwood Corp.* v. *Stutts*, 410 F.2d 351, 352 (5th Cir. 1969); *United Artists Corporation* v. *Freeman*, 605 F.2d 854, 857 n. 4 (5th Cir. 1979). Finally, granting the motion for new trial will not greatly prejudice the plaintiffs. *See Bonaventure* v. *Butler*, 593 F.2d 625, 626 (5th Cir. 1979). The plaintiffs only assert that granting the motion for new trial will cause them to incur additional expense. Transcript II at 160–162.

The court reiterates that its favorable ruling on the

motion for new trial is strictly limited to the event that the court has erred in its determination of the jurisdictional question. Being convinced that it does not have jurisdiction over this action against Saudi Arabia, the court hereby declares the default judgment void, and dismisses the action for lack of subject matter and personal jurisdiction. The clerk shall enter judgment accordingly.

SO ORDERED this 11th day of June, 1980.

/s/ D. W. SUTTLE
Senior United States
District Judge

C-1

IN THE UNITED STATES COURT OF APPEALS

For The Fifth Circuit

Unit A

No. 80-1679

RAMON CASTRO, ET AL.,

Plaintiffs-Appellants,

versus

SAUDI ARABIA,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas

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(March 26, 1981)

Before INGRAHAM, POLITZ and WILLIAMS, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.1/

1/ See *N.L.R.B.* v. *Amalgamated Clothing Workers of America*, 1970, 430 F.2d 966.